EMPLOYMENT NEWS HEADLINES JAN-MAR 2022 ISSUE 35

FEAR OF CONTRACTING THE COVID-19 VIRUS NOT A "PROTECTED BELIEF" – X v Y (ET)

The case of *X v Y* although a first instance employment tribunal case, it is an interesting one and helpful for employers. The case relates to the Claimant, Ms X, who refused to return to work following the initial lifting of the UK lockdown in the Summer of 2020. Her employer expected her to return to work in July and when she refused, the employer stopped her salary payments.

Ms X brought a claim in the employment tribunal for discrimination under the Equality Act 2010 and claimed that her place of work posed a "serious and imminent danger" under the Employment Rights Act 1996. She argued that she had a reasonable and justified belief that she was protecting herself and others (specifically her partner who was in a high-risk category) from the dangers of contracting the virus and, as a result of this "protected belief", she had suffered a detriment in that her salary had been stopped.

Applying the tests for this type of claim, the tribunal agreed that while her concern was real and genuinely held, it ruled that it was *not* a "protected" belief for the purposes of the Equality Act. It said that it was more a reaction and, therefore, an opinion based on specific information available to her and the wider population at that point in time. Furthermore, she did not satisfy the requirement for the belief to be "a weighty and substantial aspect of human life and behaviour". Her primary concern being the protection of herself and her high-risk partner. Her claim failed. While this ruling is helpful to employers, such cases should be treated with sensitivity and on their own specific facts. It goes without saying that all steps and assurances to safeguard the workplace from a health & safety perspective should be taken very seriously when persuading employees back to work.

NUMEROUS AND VEXATIOUS GRIEVANCE CLAIMS CAN LEAD TO FAIR DISMISSAL – HOPE v BRITISH MEDICAL ASSOCIATION (EAT)

While this is not a case that should be considered by employers as a green light to dismiss an employee who raises more than one grievance, the case of *Hope v British Medical Association ("BMA")* is of interest on the facts. The case involved Mr Hope who was a senior policy advisor for the BMA. During his time with the BMA, Mr Hope raised several grievances against senior managers. Primarily these related to his exclusion from meetings that he felt he should have been involved in. Mr Hope wished to discuss a few of these complaints informally with his line manager but the BMA was unable to do this due to the nature of his complaints and those who were the subjects of the complaints.

Mr Hope was asked to pursue the formal grievance process channels but refused to, he also refused to withdraw the grievances he had. This left the BMA in limbo and it had little choice but to commence

a formal grievance process. Mr Hope failed to participate or attend. The grievance hearing proceeded in his absence. None of his grievances were upheld but as a part of that process, the BMA felt that Mr Hope was vexatious in raising complaints and then not making any attempt to resolve them in a reasonable and cooperative way. Having given Mr Hope prior warning of the consequences of his continuing behaviour, it instigated a disciplinary process against Mr Hope and he was eventually dismissed for gross misconduct.

Mr Hope brought a claim for unfair dismissal, the Employment Tribunal found the dismissal to be fair on the facts. Mr Hope appealed, claiming that his dismissal was unfair as he had not fundamentally breached his contract terms which amounted to a repudiatory breach. Rejecting his appeal, the EAT also found the dismissal to be fair. In particular, it considered the following:

- The nature and the number grievances Mr Hope had raised over a short period of time of one year;
- His failure to cooperate in moving the grievances forward to resolution or withdrawing them;
- His failure to attend the formal processes which the BMA was left with no choice but to proceed with in his absence; and
- The correct processes and decisions followed by the BMA before reaching the conclusion that it did.

Ultimately, the EAT found that whilst a breach of contract can be a consideration for termination on the grounds of gross misconduct, conduct in and of itself is a fair reason for terminating employment and does not require a contractual analysis. In this case, on the facts, it found that the BMA's actions were within a "range of reasonable responses" and dismissed Mr Hope's appeal.

As mentioned above, this is not a green light to terminate employment on such grounds because many grievances are brought by an employee, rather careful consideration should be taken of all the facts and issues, being mindful of any victimisation or whistleblowing protections, to determine if the actions can be said to be vexatious behaviour amounting to gross misconduct. This will always be very fact specific.

UPDATE ON HOLIDAY PAY AND WORKERS' RIGHTS – SMITH v PIMLICO PLUMBERS (CA)

Regular readers of Maxlaw Global employment news will be aware of the ongoing saga relating to worker status and paid holiday leave. In Issue 33 of Maxlaw Global employment news we reported on the latest points the courts had considered regarding whether Mr Smith, a former worker with Pimlico Plumbers, was entitled to paid holiday leave. The conclusion in that update was that although Mr Smith was indeed found to be a worker and entitled to paid holiday leave, the courts had ruled that he was (i) out of time for bringing a claim for paid leave and (ii) he would not be entitled to be paid as he had already taken the leave, albeit unpaid, and that leave could not be carried over.

The Court of Appeal has now ruled that the ECJ ruling in *King v Sash Windows Workshop Limited* although different on the facts, does apply in this case. It stressed the right to take holiday and for that holiday to be paid are two elements of the same right. The Court has made clear that any leave taken by a worker which is unpaid will not lapse and can be carried over. Mr Smith was not, therefore, out of time in bringing his claim for paid holiday for the entirety of his six-year holiday leave entitlement at the end of his employment with Pimlico Plumbers. As previously reported in earlier

issues of Maxlaw Global news, the only instance when the right to paid holiday leave will lapse is where the employer has provided the worker the opportunity to take paid leave, positively encouraged the worker to take the leave and advised the worker that if it is not taken by the end of the leave year it will be lost. Note: this right relates to the paid statutory 4 weeks entitlement under the EU working time directive.

In light of this ruling and, while it is likely to be appealed further by the employer, for now employers who widely engage workers or "contractors" are advised to assess their liability for back and future holiday pay entitlements which could be considerable.

A FOUR DAY WORKING WEEK TO BE TRIALLED BY SOME EMPLOYERS FROM JUNE 2022

Some readers may have learnt about this 4-day working week trial in the press which will begin in June this year. For companies that are participating, in this study (see 4 Day Week Global – The Future of Work), the key assessment will be whether workers can increase or maintain the same level of productivity while working for 4 days in the week for the same amount of pay.

In the wake of the global pandemic and lockdowns, the entire way and systems of working around the globe have changed and continue to be under review. Everything from remote working, hybrid working and now shorter working weeks. Belgium has recently announced the introduction of the right for employees to request a compressed 4 day working week with the same number of hours without a change in pay. The concept is not entirely new with Iceland having had a similar trial in the past with successful results.

It will be interesting to see what will become the new "norm" if such a thing is possible with the many variations in working practices already existing. Employers who are seriously considering this change will need to think about issues such as contract variations, holiday and other statutory pay entitlements based on a 5-day working week and other issues such as employee wellbeing, career development considerations, working time and discrimination issues where there are many different arrangements which may result in vast inequalities in the workplace.

NEW STATUTORY PAYMENTS AND COMPENSATIONS RATES AS OF APRIL 2022 - A REMINDER

As employers will be aware with the arrival of April and the new tax year there are also changes to various statutory payment rates and compensation award caps for employment tribunal claims. Below are a few key ones to be aware of for the coming year.

	APRIL 2021 RATES	APRIL 2022 CHANGES IN RATES
Statutory Sick Pay (SSP)	£96.35 per week	£99.35 per week
Weeks' pay for basic award and redundancy pay calculations	£544	£571
Maternity/Paternity/Adoption/shared parental and parental bereavement leave pay	£151.97 per week	£156.66 per week
National Living Wage and Minimum Wage for workers age 23 and over	£8.91 per hour	£9.50 per hour

Basic ET award (cap)	£16,320	£17,130
Compensatory ET award (cap)	£89,493	£93,878

Note: As previously announced by the Chancellor, national insurance contribution rates for employers and employees will also increase by 1.25% from 6 April 2022.

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